

FACTUAL HISTORY

On August 20, 2004 appellant, then a 40-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on August 16, 2004 she sustained injuries while trying to restrain a patient (OWCP File No. xxxxxx603). The record indicates that she also filed an occupational disease claim (Form CA-2) on July 1, 2005 for an emotional condition resulting from an administrative action of the employing establishment (OWCP File No. xxxxxx821).³ The date of injury was reported as April 19, 2005. OWCP has combined the case files and accepted the claims for lumbar sprain/strain; lumbar disc herniation; right shoulder, upper arm, and elbow contusions; lumbago; headache; benign hypertension; migraines; post-traumatic stress disorder (PTSD); major depression; and prolonged depressive reaction. The record indicates that OWCP found appellant totally disabled as of April 19, 2005 and as of July 10, 2005, she began receiving compensation for total disability on the periodic rolls. OWCP issued a schedule award decision dated October 21, 2008 for two percent permanent impairment to the right upper extremity.

In a letter dated March 9, 2010, OWCP advised appellant that once she returned to work or obtained new employment, she must notify OWCP immediately. If she received a compensation payment covering a period she had worked, appellant was advised to return the payment to OWCP to prevent an overpayment of compensation. The record indicates that she continued to receive compensation every 28 days direct deposited to her bank account. On February 11, 2012 a payment of \$4,097.92 was deposited covering the period January 15 to February 11, 2012. On March 10, 2012 a payment of \$4,145.06 was deposited, for the period February 12 to March 10, 2012.

In a letter dated April 17, 2012, appellant indicated that as of January 23, 2012 she had begun work at a nursing school as a nursing program chair. She indicated that she worked as a consultant, primarily from home, making conference calls when necessary. OWCP periodically sent appellant EN1032 forms requesting information regarding employment activity. On August 20, 2012 it received an August 3, 2012 Form EN1032 from her indicating that she was working in private employment. Appellant indicated that from July to December 2011 she had worked as a clinical coordinator at a private college. She also reported that commencing in January 2012 she was earning \$5,000.00 per month as a private nursing program consultant working from home.

On August 24, 2013 OWCP interrupted compensation payments for total disability. By letter dated September 10, 2013, it requested that the nursing school provide information regarding appellant's employment earnings. The employing establishment responded in a September 16, 2013 letter that she had worked since January 20, 2012 earning \$5,000.00 per month. According to the nursing school, no additional benefits were provided. The nursing school indicated that appellant worked as a consultant primarily from home, making phone calls, submitting applications, and performing other duties. The record contains a copy of an initial six-month contract commencing January 23, 2012. The contract indicated that it could be

³ The employing establishment issued an April 15, 2005 letter proposing to terminate appellant's employment, finding that, during the period September 11, 2003 to January 22, 2004, she had received compensation benefits while working in private employment as a nurse. The record indicates that she had filed a claim for carpal tunnel syndrome in October 2002.

terminated by the employing establishment at any time. On September 17, 2013 appellant submitted a note indicating that earnings from concurrent, dissimilar employment should not be included in determining her wage-earning capacity.

In a December 10, 2013 letter, appellant indicated that she had informed OWCP of her private employment. She argued that dissimilar employment should not be considered in wage-earning capacity and she was not employed as a nurse in private employment.

By decision dated June 19, 2014, OWCP determined that as of January 20, 2012 appellant had earnings of \$1,153.85 per week. It found this fairly and reasonably represented her wage-earning capacity, and her compensation would be reduced effective January 20, 2012. An accompanying worksheet indicated that appellant's pay rate as of April 19, 2005 was \$1,226.54, her current date-of-injury pay rate was \$1,603.43, and therefore she knew or had a loss of wage-earning capacity of 28 percent.

By letter dated June 19, 2014, OWCP advised appellant of a preliminary determination that an overpayment of \$64,172.00 had been created from January 20, 2012 to August 24, 2013. It found that she had been paid \$88,353.80 in net compensation for the period, but should have received \$24,181.80 based on her wage-earning capacity. OWCP also advised appellant of a preliminary determination that she was at fault in creating the overpayment, as she knew or should have known that she could not accept payments after she returned to work in private employment.

Appellant requested a prerecoupment hearing before an OWCP hearing representative. A hearing was held on February 17, 2015. Appellant argued that OWCP should not use her actual earnings as a consultant in determining compensation.

By decision dated May 13, 2015, the hearing representative finalized the preliminary determination that and overpayment of \$64,172.00 was created. She also found that appellant was at fault in creating the overpayment, and therefore not subject to waiver.

LEGAL PRECEDENT -- ISSUE 1

5 U.S.C. § 8102(a) provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty. A claimant is not entitled to compensation for total disability during a period of return to work in private employment, and an overpayment of compensation is created when a claimant returns to work and continues to receive compensation.⁴ 20 C.F.R. § 10.500 provides that "compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning

⁴ See *D.S.*, Docket No. 09-2199 (issued June 8, 2010); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵

OWCP procedures state that, after a claimant has been working for 60 days, OWCP will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁶ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁷ has been codified at 20 C.F.R. § 10.403. OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position.⁸ If the actual earnings do not fairly and reasonably represent wage-earning capacity, compensation payable during the periods worked is reduced to reflect those earnings.⁹ OWCP uses the same *Shadrick* formula to determine the offset based on actual earnings.¹⁰

ANALYSIS -- ISSUE 1

In the present case, appellant had been receiving compensation for temporary total disability. On January 20, 2012 she began working as a consultant earning \$5,000.00 per month (or \$1,153.85 per week). Appellant's private employer confirmed this amount. The record indicates that she continued to work from January 20, 2012 through August 24, 2013. Appellant continued to receive compensation for temporary total disability during this period. Since she is not entitled to compensation for total disability during periods that she is working, an overpayment of compensation was created.

The amount of the overpayment is determined by calculating the amount of compensation appellant received from January 20, 2012 to August 24, 2013, and subtracting the amount she should have received during this period. OWCP calculated that she had received \$88,353.80 from January 20, 2012 to August 24, 2013. There is no contrary evidence of record.

As to the amount appellant should have received, OWCP calculated the compensation owed based on her wage-earning capacity. It calculated wage-earning capacity using actual earnings of \$1,153.85 per week and a pay rate date of April 19, 2005, representing the date of injury. Under the *Shadrick* formula, the current earnings are compared to the current pay rate for the date-of-injury job, to determine the wage-earning capacity percentage. The wage-earning

⁵ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (February 2013).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403(d).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5(e) (June 2013).

¹⁰ See *L.D.*, Docket No. 12-0081 (issued June 25, 2012); see also *G.P.*, Docket No. 14-1005 (issued November 4, 2014).

capacity in dollars is computed by multiplying the pay rate for compensation purposes by the wage-earning capacity percentage, and the result is then subtracted from the pay rate for compensation purposes to determine loss of wage-earning capacity.¹¹

The Board notes that even if a formal wage-earning capacity determination had not been issued, as noted above, OWCP would still be entitled to offset the actual earnings. Since appellant worked the entire period of the overpayment, the offset for actual earnings would be the same under the *Shadrick* formula.

Appellant has argued that she did not return to full-time work as reported by OWCP, but the issue with respect to an overpayment of compensation is the amount of earnings. The record clearly indicated that she returned to private employment and earned \$1,153.85 per week. As discussed above, OWCP may properly find an overpayment of compensation. Appellant also argues that earnings as a consultant were dissimilar earnings, but the issue of concurrent and dissimilar earnings is not presented here. The Board has held that, in determining a claimant's pay rate under 5 U.S.C. § 8114, earnings from a private-sector job are not combined with concurrent federal employment earnings if the private earnings are dissimilar.¹² The present case does not involve concurrent federal employment earnings and a determination of pay rate under 5 U.S.C. § 8114. In this case, appellant had earnings from private employment and she is not entitled to compensation for total disability during the period worked. Whether pursuant to a formal wage-earning capacity determination or an informal offset of earnings, compensation must be reduced to reflect her actual earnings.

LEGAL PRECEDENT -- ISSUE 2

5 U.S.C. 8129(b) provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience."¹³ A claimant who is at fault in creating the overpayment is not entitled to waiver.¹⁴ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: "(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect."

ANALYSIS -- ISSUE 2

The finding of fault in this case was based on the acceptance of payments that appellant knew or should have known were incorrect. Although she had notified OWCP of her return to work, the basis for finding of fault was not based on her failure to provide material information.

¹¹ 20 C.F.R. § 10.403.

¹² *Irwin E. Goldman*, 23 ECAB 6 (1971); *see also Steven J. Rose*, 44 ECAB 211 (1992).

¹³ 5 U.S.C. § 8129(b).

¹⁴ *See Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

Rather, the issue is whether appellant accepted payments she knew or should have known were incorrect.

In the context of receiving compensation after returning to work, the Board precedent on the issue of fault clearly establishes that the first payment received must be properly considered. The Board has held that receiving an initial erroneous direct deposit payment following the employee's return to work does not necessarily create the requisite knowledge to find that a claimant was at fault in the creation of the overpayment.¹⁵ Unlike the situation where a physical check is sent to appellant with the period of compensation covered, at the time of the acceptance of the first direct deposit after a return to work, a claimant does not know that an incorrect payment would be deposited on that date.¹⁶ OWCP did not establish that for the payment deposited on February 11, 2012 she knew or should have known it was incorrect. A finding that appellant was not at fault with respect to the February 11, 2012 direct deposit payment does not establish that she was entitled to waiver of that portion of the overpayment and therefore the case shall be returned to OWCP. On return of the case record, OWCP should properly consider the issue of waiver.

When appellant accepted the March 10, 2012 payment representing a full compensation payment for total disability, and continued to accept payments deposited every 28 days, she clearly should have known they were incorrect. She had been advised in a March 9, 2010 letter that she could not receive total disability after returning to work. When it became clear that OWCP was continuing to deposit compensation for total disability after her return to work, appellant is properly found to be at fault for accepting such payments.¹⁷

Since appellant was at fault for accepting the March 10, 2012 direct deposit and subsequent deposits through August 24, 2013, she is not entitled to waiver for this portion of the overpayment. OWCP properly denied waiver with respect to the overpayment amount commencing with the March 10, 2012 direct deposit.

CONCLUSION

The Board finds that OWCP properly found an overpayment of \$64,172.00 was created for the period January 20, 2012 to August 24, 2013. The Board further finds that OWCP properly denied waiver with respect to direct deposits commencing March 10, 2012. The evidence does not establish that appellant was at fault with respect to the February 11, 2012 direct deposit and the case remanded for consideration of waiver as to that portion of the overpayment.

¹⁵ See *R.R.*, Docket No. 15-1395 (issued December 11, 2015) (claimant returned to work February 25, 2015 and OWCP was notified April 7, 2015. The Board found that appellant was not at fault with respect to a March 7, 2015 direct deposit payment).

¹⁶ *Id.*

¹⁷ See *M.B.*, Docket No. 10-564 (issued December 16, 2010).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2015 is affirmed with respect to the fact and amount of overpayment. As to denial of waiver, the decision is affirmed with respect to the overpayment from February 12, 2012 to August 24, 2013, and set aside and remanded for further action regarding waiver from January 20 to February 11, 2012.

Issued: April 8, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board